



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MAY 31, 2023

IN THE MATTER OF:

Appeal Board No. 628527

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held telephone conference hearings at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed March 3, 2023 (), the Administrative Law Judge overruled the employer's objection and sustained the initial determination of eligibility.

The employer appealed the Judge's decision to the Appeal Board.

Our review of the record reveals that the case should be remanded to hold a hearing. Further testimony and other evidence are needed to decide the issues involved in this case.

Specifically, the employer shall be prepared to address how its application process is compliant with the Fair Chance Act [32 N.Y.C. Admin. Code §§

8-107(11)]; whether the claimant's position was exempt pursuant to provisions of the Act, which forbid questioning applicants on their criminal history prior to an offer of employment being made; and if so, whether the claimant

was on notice of such exemption.

In addition, the parties shall be prepared to provide testimony and other evidence to establish the date on which the claimant was offered the employment as a deckhand that he started on May 3, 2021, and whether his completion of the Comprehensive Personnel Document (CPD) form on April 27, 2021 was before or after he was offered that job.

In light of the claimant's testimony that he had provided the employer with complete information about his convictions, job qualifications, and work history when he applied in 2018, the parties are directed to produce the claimant's initial application for the position, and any other forms or applications completed by the claimant in connection with the position of deckhand.

The employer shall also be prepared to testify regarding how and whether the claimant's responses on any applications or forms completed prior to April 27, 2021 were made known to the Department of Citywide Administrative Services (DCAS) investigators who were determining whether the claimant was qualified to hold the position of deckhand. The employer shall be prepared to explain the one-year delay in requesting additional information from the claimant about his qualifications and prior convictions.

The claimant is directed to produce all communications he had with the DCAS investigations section, (not already made part of the record) regarding his qualifications for the position of deckhand and his prior convictions. Given the claimant's testimony that he did not receive communications sent to him by the DCAS in May 2022 because they were sent to an old address, the claimant shall establish when his address changed between 2018 and May 2022.

All relevant documents produced by the parties shall be received into evidence after the appropriate confrontation and opportunity for objection.

The parties are placed on notice that failure to produce the testimony and evidence directed herein may result in the hearing Judge or the Board taking an adverse inference against that party, and determining that the evidence not produced would not have supported that party's position.

The hearing Judge may receive any other evidence needed to decide the issues.

Now, based on all of the foregoing, it is

ORDERED, that the decision of the Administrative Law Judge be, and the same hereby is, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issues, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

MARILYN P. O'MARA, MEMBER